Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-321

In The

Supreme Court of the United States

October Term, 1997

KEITH ROONEY, by and through his next best friend, JOHN ROONEY, JR., his father; JOHN ROONEY, III; JOHN ROONEY, JR.; and MARSHA ROONEY, his wife,

Petitioners,

v.

GEORGE LEE WATSON, individually and in his official capacity, and the COUNTY OF VOLUSIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TURA SCHNEBLY
Counsel of Record
Assistant County Attorney
County of Volusia
123 W. Indiana Avenue
DeLand, Fl 32720
Telephone: (904) 736-5950

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

44 pp

QUESTION PRESENTED FOR REVIEW

The Respondents disagree with Petitioners' QUESTION PRESENTED FOR REVIEW. The question raised by this case is:

> Whether the substantive due process element of the Fourteenth Amendment is implicated when physical injury and property damage result from a night-time intersectional vehicular accident which occurs after the claimant driver observes the illuminated headlights of an oncoming speeding vehicle, determines there is time to complete a left turn, and turns claimant's vehicle left into the path of the oncoming vehicle which claimant driver determines post accident to be a patrol car driven by an "on duty" law enforcement officer who is neither responding to a call nor pursuing a fleeing suspect.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. PETITIONERS' VERSION OF THE FACTS IS INACCURATE IN "A. THE PARTIES AND INCIDENT BELOW" AND "B. THE CLAIMS AND RECORD EVIDENCE BELOW." 1

B. PETITIONERS CONTINUE TO TRY TO INSERT A NEW CAUSE OF ACTION AT THE APPELLATE LEVEL 2

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED 4

A. THERE IS NO RULE 10 "CONFLICT" TO SUPPORT GRANTING A WRIT OF CERTIORARI 4

B. REVIEW IS NOT WARRANTED; THE STANDARD OF CARE NECESSARY TO PROVE A VIOLATION OF SUBSTANTIVE DUE PROCESS ARTICULATED BY THE ELEVENTH CIRCUIT IN THE ROONEY DECISION DOES NOT CONFLICT WITH THE STANDARD OF CARE ARTICULATED IN THE DECISIONS OF THIS COURT OR BY THE DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEAL ... 5

1. "CONFLICT" CASE OVERVIEW 5

2. ESTABLISHING LIABILITY UNDER TITLE 42 U.S.C. SECTION 1983 7

TABLE OF CONTENTS – Continued

Page

3. ESTABLISHING A CONSTITUTIONAL DEPRIVATION UNDER THE SUBSTANTIVE DUE PROCESS COMPONENT OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE..... 13

4. UNINTENDED INJURY TO LIFE, LIBERTY OR PROPERTY NOT ABUSE OF GOVERNMENTAL POWER..... 17

5. ESTABLISHING GOVERNMENTAL LIABILITY FOR A CONSTITUTIONAL TORT BY OF ITS EMPLOYEE 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES CITED:

Adickes v. H.S. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) 22

Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) 15

Burch v. Apalachie Community Health Services, Inc., 840 F.2d 797 (11th Cir. 1988), *aff'd by Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) 5

Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986) 4, 5, 16, 17

Checki v. Webb, 785 F.2d 534 (5th Cir. 1986) 22

Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979) 7

City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) 6, 9, 11, 23

City of Edgewater v. Montesano, 477 So.2d 54 (Fla. 5th DCA 1985) 22

City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) ..... *passim*

City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) 9, 22, 23

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) 9, 23

Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) ..... *passim*

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) 5, 6, 14, 15, 17, 18

Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) 6, 14, 15, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Davidson v. O'Lone, 752 F.2d 817 (3rd Cir. 1984) 12

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) 15

Fagan v. City of Vineland, 22 F.3d 1283 (3rd Cir. 1994), on reh. *en banc*, 22 F.3d 1296 (3rd Cir. 1994) ..... *passim*

Fargo v. City of San Juan Bautista, 857 F.2d 638 (9th Cir. 1988) 20

Foy v. City of Berea, 58 F.3d 227 (6th Cir. 1995) 22

Frank v. Lurie, 157 So.2d 431 (Fla. 2nd DCA 1963) 16

Hinton v. City of Elwood, Kan., 997 F.2d 774 (10th Cir. 1993) 8

Hodges v. Helm, 222 So.2d 418 (Fla. 1969) 16

In Re City of Philadelphia Litigation, 49 F.3d 945 (3rd Cir. 1995) 8, 12

Jones v. Chieffo, 833 F. Supp. 498 (E.D. Pa. 1993), *aff'd without opinion*, 22 F.3d 169 (3rd Cir. 1994) 8

Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987) 22

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) 7

Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996) 6, 20, 21

Mark v. Borough of Hatboro, 51 F.3d 1137 (3rd Cir. 1995) 8, 12, 13

TABLE OF AUTHORITIES – Continued

Page

Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992) 21

Monell v. Department of Social Service, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 22

Myers v. Morris, 810 F.2d 1437, *reh'g and reh'g en banc denied*, (8th Cir. 1987) 22

Nishiyama v. Dickson County, Tenn., 847 F.2d 277 (6th Cir. 1987) (en banc) 22

Orme v. Burr, 25 So.2d 870 (Fla. 1946) 16

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 5, 6, 14, 15, 17

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) 6, 14, 15

Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) 9, 23

Revene v. Charles County Commissioners, 882 F.2d 870 (4th Cir. 1989) 3, 6, 17

Roach v. City of Fredericktown, 822 F.2d 294 (8th Cir. 1989) 5, 8, 21, 24

Temkin v. Frederick County Commissioners, 945 F.2d 716 (4th Cir. 1991) 8, 21

Thompson v. Boggs, 33 F.3d 847 (7th Cir. 1994) 8

Vineyard v. County of Murray, Ga, 990 F.2d 1207, *cert. denied*, 510 U.S. 1024, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993) 5, 10, 24

Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1992) 3

TABLE OF AUTHORITIES – Continued

Page

Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988), *reh'g granted and opinion modified by* 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990) 20

Yee v. Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) 4

Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) 5, 6, 14

UNITED STATES CONSTITUTION CITED:

Fourth Amendment 3

Fourteenth Amendment 3, 10, 15, 20, 21

RULE CITED:

Supreme Court Rule 10 4

OTHER AUTHORITIES CITED:

1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 (3rd ed.) 8, 9

STATEMENT OF THE CASE

A. PETITIONERS' VERSION OF THE FACTS IS INACCURATE IN "A. THE PARTIES AND INCIDENT BELOW" AND "B. THE CLAIMS AND RECORD EVIDENCE BELOW."

Petitioners have inappropriately included "facts" not cited by either the trial court in its Order Granting Summary Judgment or the Eleventh Circuit Court of Appeal in its opinion. Petitioner seeks to blur the purported evidence of constitutional deprivation with the purported evidence of governmental liability. Both lower courts relied on the same material facts for determining whether the Petitioners had been deprived of any constitutional right. Finding no constitutional deprivation, neither court reached the issue of governmental liability. Respondents respectfully request that this Court review only those material facts considered by the courts below.[1]

---

[1] For purposes of the Motion for Summary Judgment the "material facts" recited by Judge Conway in the Order Granting Summary Judgment were undisputed among the parties. *See,* Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, p.31. Paraphrased in the "Background" of its opinion, these material facts were adopted by the Eleventh Circuit Court of Appeal. *See,* Petition for a Writ of Certiorari, App.2. The undisputed facts set forth in Respondents' Appendix at App.1-11 were posited in their Answer Brief below as material *only* if the Eleventh Circuit found that the trial court erred in finding no constitutional deprivation by the conduct of Deputy Watson. *See,* Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, pp.5-17. These Respondents include these in their Appendix here to illuminate error in Petitioners' non material facts and to provide background for Judge Anderson's concurring opinion in the Rooney case. *See,* n.15, *infra.*

THE MATERIAL FACTS

Plaintiffs Keith Rooney and John Rooney III were injured when the vehicle they were occupying was involved in a traffic accident with a sheriff's patrol vehicle driven by Defendant George Lee Watson. The accident occurred on the evening of January 23, 1989. Watson was "on duty" as a deputy sheriff at the time of the collision. It is undisputed that he was neither engaged in a police pursuit, nor responding to an emergency call. It is also undisputed that he was not operating his emergency lights and siren. The Rooneys' vehicle was struck when it turned left into the path of Watson's oncoming vehicle. Plaintiffs' accident reconstructionist opines that Watson's vehicle was traveling approximately 82 m.p.h. prior to the collision, reduced to approximately 73 m.p.h. at the time of impact. Deposition of Joseph Wattleworth, Ph.D. (Dkt. 150) at 86. The speed limit was 55 m.p.h. at the site of the accident.[2]

B. PETITIONERS CONTINUE TO TRY TO INSERT A NEW CAUSE OF ACTION AT THE APPELLATE LEVEL

At the district court level, the Rooneys asserted that the County of Volusia and Deputy Watson, "subjected them to a deprivation of their rights to life, liberty and property; their rights to procedural due process; and their

---

[2] Order Granting Summary Judgment. *See*, Petition for a Writ of Certiorari, App.11-App.12.

rights to travel protected by the privileges and immunities clause, all guaranteed by the United States Constitution." The Rooneys' Petition for Writ of Certiorari asserts a violation of the Rooneys' rights only under the Fourteenth Amendment; abandons any claim under the Fifth Amendment and continues the appellate omission/abandonment of any claim of deprivation of their right to travel. The County of Volusia asserts and assumes abandonment of these claims.

The Rooneys also appear to have abandoned their claim of deprivation of their constitutional rights under the Fourth Amendment. Nevertheless, Petitioners' argument in support of their Fourteenth Amendment claim may also be read as a Fourth Amendment claim. The Petitioners analogize the conduct of Deputy Watson as "a vehicular attack" upon the Rooney boys to the conduct of the Charles County deputy sheriff who purposefully shot and killed Charles Revene. *See,* Petition for a Writ of Certiorari at p.17 and *Revene v. Charles County Commissioners,* 882 F.2d 870 (4th Cir. 1989).

A Fourth Amendment claim for unlawful seizure and excessive use of force was first raised by the Rooneys on appeal in the Eleventh Circuit. *See,* Appellants' Initial Brief, pp.35-36. In their Answer Brief in the Eleventh Circuit the Respondents, County of Volusia and George Lee Watson, in his official capacity, objected to the assertion of the new claim and these Respondents continue to do so. See Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, p.30. A new basis for a claim may not be raised in this manner at the appellate level. *See, Wisconsin v. Mitchell,* 508 U.S. 476, 113 S.Ct. 2194, 2198, n.2, 124 L.Ed.2d 436

(1992); *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

A. THERE IS NO RULE 10 "CONFLICT" TO SUPPORT GRANTING A WRIT OF CERTIORARI

Petitioners seek a Writ of Certiorari by invoking Rule 10(a) of the Rules of the Supreme Court. Petitioners have either misread applicable cases or have claimed conflict with nonapplicable ones. Petitioners assert that the Eleventh Circuit Court of Appeals erred in its factual analysis by failing to consider the conduct of Deputy Watson in the context of the conduct of his governmental employer, the County of Volusia. Because of this failure, Petitioners assert that the Eleventh Circuit mischaracterized the conduct of Deputy Watson as negligent or grossly negligent rather than an abuse of power. Although Petitioners agree with the Eleventh Circuit's properly stated rule of law that a negligent act is not cognizable under Title 42 U.S.C. Section 1983, Petitioners argue that this rule of law was factually misapplied by the Eleventh Circuit in the case at bar and *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). Petitioners do not provide compelling reasons nor conflict with other circuit courts on the same important matter sufficient to justify this Court's granting of a Writ of Certiorari.

B. REVIEW IS NOT WARRANTED; THE STANDARD OF CARE NECESSARY TO PROVE A VIOLATION OF SUBSTANTIVE DUE PROCESS ARTICULATED BY THE ELEVENTH CIRCUIT IN THE *ROONEY* DECISION DOES NOT CONFLICT WITH THE STANDARD OF CARE ARTICULATED IN THE DECISIONS OF THIS COURT OR BY THE DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEAL.

1. "CONFLICT" CASE OVERVIEW

In the case submitted for review, the trial judge based her ruling upon precedent of this Court and the Eleventh Circuit Court of Appeal. *See, Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, cert. denied, 510 U.S. 1024, 114 S.Ct. 636, 126 L.Ed.2d 594 (1993); *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). The Eleventh Circuit relied not only on these cases but also *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-1913, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Burch v. Apalachie Community Health Services, Inc.*, 840 F.2d 797, 800 (11th Cir. 1988), aff'd by *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); and *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294 (8th Cir. 1989).

The Rooneys seek a Writ of Certiorari based upon an alleged conflict between the instant decision of *Rooney v. Watson* and six decisions of this Court and three decisions from various circuit courts of appeal. The Rooneys claim that the "custom or policy" analysis by the Eleventh Circuit conflicts with the decisions of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Daniels v.*

Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) and *Revene v. Charles County Commissioners*, 882 F.2d 870 (4th Cir. 1989). The Rooneys claim that the "failure to train" analysis by the Eleventh Circuit conflicts with *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Collins v. City of Harker Heights, Texas*, 475 U.S. 796, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994), on reh *en banc*, 22 F.3d 1296 (3rd Cir. 1994); and *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996).

The *Rooney* holding by the Eleventh Circuit Court of Appeals is in accord with this Court's decisions in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Collins v. City of Harker Heights*, 475 U.S. 796, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). The *Rooney* holding does not conflict with petitioners' cited cases of the Third, Fourth, and Ninth Circuits, respectively, in a manner requiring issuance of the requested Writ. The Petition for Writ of Certiorari should be denied.

2. ESTABLISHING LIABILITY UNDER TITLE 42 U.S.C SECTION 1983

The Rooneys have sued the County of Volusia and Deputy George Lee Watson, individually and in his official capacity. The addition of George Lee Watson in his official capacity as a defendant, is surplusage. The naming of an appropriate official capacity defendant is another way of suing the governmental entity and the proof required for liability is identical. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Thus, the arguments of County of Volusia and George Lee Watson, in his official capacity, are merged.

The statutory vehicle by which the Rooneys sought damages against the County of Volusia and George Lee Watson, individually and in his official capacity, is Title 42, United States Code, Section 1983.[3] The statute itself does not create any substantive rights but authorizes relief if a claimant proves the requisite elements to establish liability. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979).

To prevail the claimant must first prove there was a deprivation of any rights, privileges, or immunities secured by the Federal Constitution or a federal law other than Title 42, Section 1983; the claimant must then prove

---

[3] "Every person who, under color of any Statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to a party injured in an action at law, suit in equity or other proper proceeding for redress."

that such deprivation was caused by the act or omission of a person under color of law. If a claimant sues a governmental actor and the governmental employer, there is a distinct and separate threshold standard of proof to establish governmental liability.

In following the analytical process established by this Court for proving a claim under Title 42 U.S.C. Section 1983, both courts below relied upon the decision of *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986). In *Heller* this Court found that no court decision authorized damages against a government if the government's officer inflicted no constitutional harm, and said, " . . . if a person has suffered no constitutional injury at the hands of the individual police officer, the fact that department regulations might have authorized the use of constitutionally excessive force is quite beside the point."[4] *In accord, see also, Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995); *In re City of Philadelphia Litigation*, 49 F.3d 945 (3rd Cir. 1995); *Thompson v. Boggs*, 33 F.3d 847, 858-59 and n.11 (7th Cir. 1994); *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993); *Temkin v. Frederick County Com'rs*, 945 F.2d 716, 724 (4th Cir. 1991); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-298 (8th Cir. 1989); *Jones v. Chieffo*, 833 F. Supp. 498, 507-508 (E.D. Pa. 1993), *aff'd without opinion*, 22 F.3d 169 (3d Cir. 1994).[5] *But see, Fagan v. City of*

---

[4] This holding had the effect of affirming the district court's ruling that the theory against the governmental defendants based on *Monell* was moot. *Id.* at p.800, n.1.

[5] In Volume I of his treatise, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983 Sheldon H. Nahmod asserts:

Vineland, 22 F.3d 1283 (3rd Cir. 1994), on *reh'g en banc*, 22 F.3d 1296 (3rd Cir. 1994) and discussion *infra* at pages 11-14.

More recently, in the unanimous opinion of *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), this Court emphasized " . . . the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred." *Id.* at 122 and at 1067. This Court stated that it had assumed that a constitutional violation had been adequately alleged or proved in the cases of *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Pembaur v. City of Cincinatti*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986) and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). In *Harris, Praprotnik, Pembaur*, and *Tuttle* this Court's opinions focused solely on the separate issue of governmental liability. *Id.* at 121-122 and at 1066-1068. In *Collins*, Justice Stevens specified that the *Canton* Court *had identified* "deliberate indifference" as the *threshold standard for finding governmental liability* for a constitutional tort by an inadequately trained employee and *not the threshold standard of proof* that a claimant must show to

---

"*Heller's* precise holding is not controversial. Surely a local government cannot be held liable for a constitutional deprivation brought about through an official policy or custom if a determination has been made that there was no constitutional deprivation in the first place." 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, THE LAW OF SECTION 1983, 425 (3rd Ed.)).

make out the underlying claim *of a constitutional violation*. (emphasis added) *Id.* at 124 and at 1068.

The Rooneys ignore *Heller, Collins,* and their predecessors and progeny including the opinion of the Eleventh Circuit Court of Appeal in *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207, 1211 (11th Cir. 1993). That Petitioners miss the point of *Heller* and *Collins* can be seen in the format of their Petition. Petitioners do not establish the legal duty of care owed by a law enforcement officer under the Fourteenth Amendment to citizens under the facts and circumstances of the instant case. Petitioners do not apply the legal standard of care to the conduct of Deputy Watson and show that the conduct of Deputy Watson violated that standard of care vis-a-vis the Rooneys and deprived them of a constitutional right. The Petitioners simply discuss "custom or policy" and "failure to train," confusing and combining the threshold standard of proof for the underlying constitutional violation by a state actor with the threshold standard of proof for establishing governmental entity liability.

The Rooneys argue that there is a blurring of the evidence of proof of constitutional deprivation with that of governmental liability. The Rooneys assert a due process claim may even be maintained against the County of Volusia when there was no violation of the Fourteenth Amendment by Deputy Watson. The Rooneys rely upon *Fagan v. City of Vineland*, 22 F.3d 1283 (*Fagan I*), on *reh'g en banc*, 22 F.3d 1296 (*Fagan II*) (3rd Cir. 1994).[6]

---

[6] At the time the Rooneys' lawsuit was filed, *Fagan* had been decided at the district court level where the court entered

The *Fagan I* panel unanimously held " . . . that the City may be independently liable for violating the plaintiff's constitutional rights even if no individual police officer is liable." 22 F.3d at 1302. The *Fagan I* court said: " . . . [I]n a substantive due process case *arising out of a police pursuit,* an underlying constitutional tort case still exists even if no individual police officer violated the Constitution." 22 F.3d at 1292. (emphasis added)

In *Fagan II,* the City of Vineland and the defendant police officers limited their Petition for Rehearing *en banc* to the question of the appropriate standard to be applied in police pursuit cases which allege a violation of substantive due process. *Id.* at 1302. After granting rehearing *en banc,* the Court, pursuant to its Internal Operating Procedures, vacated the panel's opinion. *Id.* The *en banc* court limited its consideration to the one issue raised in the petition. The panel opinion on all the other issues, edited to conform to the new *en banc* result, was filed contemporaneously with the *en banc* opinion.

Although the *en banc* decision found that: "[T]he City is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive plaintiffs of life and liberty," the opinion also favorably cites one of its earlier *en banc* decisions which found

---

summary judgment in favor of the City of Vineland. The District Court applied the two prong test and cited *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) and *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).

"where a person suffers *injury as an incidental and unintended consequence* of official action, the abuse of power contemplated in the due process and [eighth] amendment cases does not arise." (emphasis added)[7]

Fagan I and *Fagan II* examined the facts of a police pursuit of suspect Tesoroni. Although the officer did not intend for Tesoroni to speed away or to be injured, the officer's attempt to pull Tesoroni over had that result. Unlike the officer in *Fagan*, the conduct of Deputy Watson did not cause John Rooney, III, to turn his vehicle. Deputy Watson's conduct did not cause John Rooney, III, to misjudge the speed of the oncoming patrol car. At most, the Rooney case falls factually within the *O'Lone* category and there is no conflict with either *Fagan I* or *Fagan II*.

It is doubtful that the anomalous portion of the decision in *Fagan I* finding independent governmental liability carries great weight even within the Third Circuit Court of Appeal itself. Two essentially different panels of the Third Circuit have addressed governmental liability under Section 1983 and have followed the two pronged analysis emphasized in *Collins*. In March of 1995, Judge Lewis, who served on the *Fagan I* panel, followed the two pronged analysis and found a constitutional deprivation (excessive use of force) as a precursor to governmental liability. *See, In re City of Philadelphia Litigation*, 49 F.3rd 945 (3rd Cir. 1995). Later that same month, another panel of the circuit addressed the case of *Mark v. Borough of Hatboro*, 51 F.3d 1137, Sur Petition *reh'g denied, en banc*

---

[7] *Davidson v. O'Lone*, 752 F.2d 817, 827 (3rd Cir. 1984), *aff'd sub nom.*, 471 U.S. 1134, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985).

reh'g denied (3rd Cir. 1995). In the majority opinion, Judge Greenburg distanced the *Mark* decision from *Fagan I* and quoted the language from *Collins* requiring separation of the two different issues in analyzing a Section 1983 claim. *Id.*, at 1149-50. In recognition of *Collins'* two prong test, Judge Greenburg noted that " . . . the *Fagan* panel appeared to hold that plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. . . . [B]y focusing almost exclusively on the 'deliberate indifference' prong of the *Collins* test, the panel opinion did not apply the first prong – establishing an underlying constitutional violation." *Id.* at 1149-1150, n.13.

There is no material conflict between or within the circuits for this Court to resolve.

3. ESTABLISHING A CONSTITUTIONAL DEPRIVATION UNDER THE SUBSTANTIVE DUE PROCESS COMPONENT OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

Under the two prong test of *Heller* and *Collins*, the first prong is to establish deprivation of a constitutional right. To determine whether the Rooneys have suffered a substantive due process constitutional deprivation cognizable under Title 42 U.S.C. Section 1983, the Rooneys' claims should be analyzed using cases that have reviewed deprivation claims under the Fourteenth Amendment, *simpliciter*. This Court has considered such deprivation

claims in the context of injury to reputation in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), loss of property in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), personal injury in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), personal injury in *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), wrongful death in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), and loss of liberty in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

Of these cases, three turned on substantive due process issues and three on procedural due process issues. Those addressing substantive due process were *Daniels*, *Davidson*, and *Collins* and those addressing procedural due process were *Paul*, *Parratt*, and *Zinermon*. As the Rooneys submit a substantive due process claim there can be no conflict shown with *Paul*, *Parratt* and *Zinermon*.

Although the holdings of *Paul* and *Parratt* address issues of procedural due process, the dicta of these cases discuss concerns that if the claims in those cases were upheld, the cases could be used to support Fourteenth Amendment claims in cases which factually match the case under consideration by this Court as the subject of the Petition for a Writ of Certiorari. In the subject case, John Rooney III turned his northbound vehicle left across the southbound lane of State Road 11 into the path of the southbound "speeding" patrol vehicle at an intersection which had no traffic control devices except a broken centerline. This Court opined in *Paul* that if the claimant prevailed, then "it would be difficult to see why . . . the survivors of an innocent bystander . . . negligently killed

by a sheriff driving a government vehicle would not have claims equally cognizable under 1983." *Paul v. Davis*, 424 U.S. 693 at 698, 96 S.Ct. 1155 at 1159, 47 L.Ed.2d 405 (1976). The *Parratt* Court was concerned that adopting the rationale of that claimants' argument would permit " . . . any party who is involved in nothing more than an automobile accident with a state official [to] . . . allege a constitutional violation under Section 1983. 'Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may be already administered by the states'; *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976)." *Parratt v. Taylor*, 451 U.S. 527 at 544, 101 S.Ct. 1908 at 1917, 68 L.Ed.2d 420 (1981).

The protection of the Due Process Clause, whether substantive or procedural, is not triggered by negligence even if such negligence led to serious injury. *Davidson v. Cannon*, 474 U.S. 344, 347-348, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). The Fourteenth Amendment is simply not implicated by *unintended* injury to life, liberty, or property. *Daniels v. Williams*, 474 U.S. 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The intent of the Due Process Clause is to prevent governmental abuse of its power. *See, Collins v. City of Harker Heights*, 503 U.S. 115 at 125, 112 S.Ct. at 1069 quoting from *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 at 196, 109 S.Ct. 998 at 1003, 103 L.Ed.2d 249 (1989), quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986). *See also, Daniels v. Williams*, 474 U.S. 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

Based upon the facts analyzed in the case under review, the Eleventh Circuit Court of Appeals found the Rooney case materially indistinguishable from its decision in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986)[8] and opined that Deputy Watson's conduct might be characterized as negligent or grossly negligent.[9] Following its holding in *Cannon*, the Eleventh Circuit found that whether the conduct of Deputy Watson was characterized as negligent or grossly negligent that conduct did not implicate the Fourteenth Amendment and did not support a claim under Title 42 U.S.C. Section 1983.[10]

---

[8] In the *Cannon* case, Lema Cannon was killed in an intersectional accident with a city police vehicle in which Officer Taylor was responding to a disturbance call at a local pool hall and was driving his police vehicle without emergency lights or siren activated at a speed of at least forty-six miles per hour in a thirty mile per hour zone. 782 F.2d at 948. Officer Taylor was not involved in a "pursuit" or a "police chase." *Id.*

In the instant case, the Rooney/Watson accident occurred in a very rural area of Volusia County on a state highway (S.R. 11) when Plaintiff/Appellant, John Rooney, III, turned his northbound vehicle left to access a dirt lane (Reynolds Road), which intersects with the west side of S.R. 11. Deputy Watson was not responding to a specific call and was not involved in a "pursuit" or "police chase," he was en route from his usual east side zone to assist in providing zone coverage as necessary on the west side of the County. Deputy Watson, like Officer Taylor of *Cannon*, was operating his police vehicle at an assumed speed of 75-82 miles per hour, fifty percent over the posted speed when this accident occurred.

[9] Under Florida law speed alone is not sufficient evidence to prove a driver was guilty of gross negligence. *See, Hodges v. Helm*, 222 So.2d 418 (Fla. 1969); *Orme v. Burr*, 25 So.2d 870 (Fla. 1946); *Frank v. Lurie*, 157 So.2d 431 (Fla. 2nd DCA 1963).

[10] In *Cannon* the Eleventh Circuit Court of Appeal held as a matter of law " . . . that a person injured in automobile accident

Petitioners admit that negligent conduct does not give rise to a constitutional tort under *Daniels* and *Davidson;* but relying on a misreading of *Parratt,* Petitioners argue that negligent conduct or grossly negligent conduct of an officer is not viewed separately from the conduct of the government in a substantive due process case involving "custom or policy" and/or "failure to train" and that negligent or grossly negligent conduct may be viewed as more than negligent or grossly negligent in the superimposed context.

4. UNINTENDED INJURY TO LIFE, LIBERTY OR PROPERTY NOT ABUSE OF GOVERNMENTAL POWER

Evaluation of the facts of the instant case against this Court's forgoing substantive due process decisions shows that the Rooney case does not fall within this Court's parameters for establishing a violation of a substantive due process right. Although Deputy Watson was "on duty,"[11] it is doubtful that his conduct was under color of

---

caused by the negligent, or even grossly negligent operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action for violation of a federal right." *Cannon,* 782 F.2d at 950.

[11] *See also, Revene v. Charles County Commissioners,* 882 F.2d 870, 872 (4th Cir. 1989), (finding that the fact the officer was "off duty" did not dictate that he was not acting under color of law). The *Revene* decision turned on the "color of law" issue and did not address the threshold standard for liability for establishing a substantive due process claim or the threshold standard for governmental liability. There is no conflict between the *Revene* decision and the *Rooney* decision which merits *certiorari* review by this Court.

law in a constitutional sense. These Respondents noted in their Answer Brief in the Eleventh Circuit that there is nothing in the material facts which supports that the Rooney boys and Deputy Watson had any relationship to each other beyond that of the relationship of any motorists approaching each other from opposite directions on a rural highway. *See*, Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his Official Capacity, p.34.

The Rooney/Watson "relationship" is the type of relationship that this Court's majority found unavailing in *Daniels* when it opined that "[t]he only tie between the facts of this case and anything governmental is the fact that the respondent was a sheriff's deputy at the Richmond City jail and petitioner was an inmate in that jail." *Daniels v. Williams*, 474 U.S. 327 at 332, 106 S.Ct. 662 at 666, 88 L.Ed.2d 662 (1986). Justice Blackmun, who concurred with this statement in *Daniels*, expanded and explained it in his *Davidson* dissent. Justice Blackmun opined that, in *Daniels*, the negligence was " . . . only coincidentally connected to an inmate-guard relationship; the same incident could have occurred on any staircase. Daniels in jail was as able as he would have been anywhere else to protect himself against a pillow on the stairs. The State did not prohibit him from looking where he was going or from taking care to avoid the pillow." *Davidson v. Cannon*, 474 U.S. 344 at 355, 106 S.Ct. 668 at 674, 88 L.Ed.2d 677 (1986).

This analysis is even more applicable to the *Rooney* case where there is no governmental custodian. That is, the only tie between the facts of this case and anything governmental is that a sheriff's deputy was driving a patrol vehicle. As the deputy was not engaged in an

emergency response or pursuit, the same incident could happen between two opposing motorists on any rural highway. The government neither prohibited John Rooney, III, from looking where he was going nor prohibited him from taking care to avoid turning in front of the oncoming "speeding" vehicle which he saw approaching.

There is nothing in the "material facts" which supports a finding that any conduct of Deputy Watson prompted a decision of John Rooney, III, to turn left into the path of the patrol vehicle. To the contrary, John Rooney, III, testified that he brought his parents' truck to a full stop at a rural highway intersection when he had no traffic control device requiring him to do so and he saw no traffic approaching. (R5-152, p.32). He further testified that after he was stopped, he saw the headlights of a southbound vehicle. *Id.* at 34 (1-4). Without ever losing sight of those headlights and without anything compelling him to do so, John Rooney, III, made the decision to leave the stopped position and turned his parents' truck into the path of the southbound vehicle to access Reynolds Road on the west side of S.R. 11. *Id.* at p.34 (7-22); p.35 (20-21). It was not until he was out of the truck and the truck had burst into flames that John Rooney, III, " . . . first noticed that the vehicle that struck his was a sheriff's patrol car,". See, Petition for A Writ of Certiorari at p.4.

There is nothing in the "material facts" which supports that Deputy Watson abused his power or intended any injury to life, liberty or property of himself and/or others as he drove south on S.R. 11.

To establish conflict between the decisions of the circuit courts of appeal and the *Rooney* decision regarding

the threshold standard for establishing a substantive due process violation, the Petitioners offer the police pursuit cases of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996); and *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994), on *reh'g en banc*, 22 F.3d 1296 (3rd Cir. 1994). In *Lewis* the Ninth Circuit adopted a standard of care that required that an officer's conduct exhibit "deliberate indifference to or reckless disregard for, a person's right to life and personal security" to establish a constitutional deprivation under the substantive due process element of the Fourteenth Amendment.[12] The Third Circuit ruled that "the substantive component of the due process clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.' " *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994), on *reh'g en banc*, 22 F.3d 1296, 1302 (3rd Cir. 1994). Neither of these decisions adopt negligence or gross negligence as the standard for evaluating a police officer's conduct to determine whether a substantive due process violation has occurred. The Eleventh Circuit Court of Appeal's factual finding that Deputy Watson's conduct may be characterized as either negligence or gross negligence does not establish conflict with either the *Lewis* or *Fagan* decision as claimed by the

---

[12] The Ninth Circuit specifically overruled its earlier decisions in *Fargo v. City of San Juan Bautista*, 857 F.2d 638 (9th Cir. 1988) and *Wood v. Ostrander*, 851 F.2d 1212, 1214 (9th Cir. 1988) ("*Wood I*"), *reh'g granted and opinion modified by*, 879 F.2d 583 (9th Cir. 1989) ("*Wood II*"), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990), to the extent *Fargo*, *Wood I*, and *Wood II* set a standard of gross negligence for a 1983 violation alleged under the due process clause. *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996).

Petitioners. Clearly, the Eleventh Circuit applies a higher standard to conduct to establish a substantive due process violation. The fact that the higher standard was not articulated in *Rooney* does not create conflict.

Although the Third Circuit used the higher standard of "shocks the conscience" and the Ninth circuit used "deliberate indifference", neither the *Fagan* nor the *Lewis* decisions found a deprivation of substantive due process by a law enforcement officer even in the context of driving at high speeds during a police pursuit or emergency response. Neither do the cases found by the Respondents. (*See* n.13 and 14). The Petitioners offer no case that either suggests or finds that negligence or gross negligence by a law enforcement officer driving at high speeds will support a substantive due process claim under Title 42 U.S.C., Section 1983. Research by these Respondents did not reveal any circuit court of appeal which currently evaluates negligent or grossly negligent police officer conduct during a high speed chase or emergency response as violative of substantive due process.[13]

---

[13] *See, Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (finding reckless disregard as the standard to establish a substantive due process violation of the Fourteenth Amendment); *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); (affirming summary judgment in favor of officer and county; finding no substantive due process violation as officer's conduct did not "shock the judicial conscience" in a nighttime high speed pursuit (65-105 miles per hour) of claimant who failed to pay $17.00 for gasoline at a convenience store did not shock the judicial conscience); *Roach v. City of Fredricktown*, 882 F.2d 294, 297 (8th Cir. 1989) (affirming dismissal of claims; finding no substantive due

5. ESTABLISHING GOVERNMENTAL LIABILITY FOR A CONSTITUTIONAL TORT BY ITS EMPLOYEE

In proving a Section 1983 claim against a government rather than an individual, a claimant may not rely on a theory of *respondeat superior, Monell v. Department of Social Service*, 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978), but must prove that a statute, ordinance, custom or usage of the government caused the government's officer or employee to violate another's constitutional rights. *Id.* See also, *Adickes v. H.S. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), 105 S.Ct. 2427, 85 L.Ed.2d 791; *City of Edgewater v. Montesano*, 477 So.2d 54, 55 (Fla. 5th DCA 1985). Proof is required that the "offending" statute, ordinance, custom or practice of the government was established by the deliberate choice of the government officials responsible for final policy with

---

process violation by officer's conduct in high speed pursuit of a misdemeanor suspect *without the patrol car's siren activated* as not "shocking to judicial conscience"; citing *Myers v. Morris*, 810 F.2d 1437, *reh'g* and *reh'g en banc denied* (8th Cir. 1987) finding neither negligence nor gross negligence implicates any aspect of the due process clause) *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986) (reversing jurisdictional decision and confirming "shocks the conscience" standard for evaluating substantive due process claims). *See also, Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (holding gross negligence or outrageous conduct is sufficient to implicate the due process clause relying specifically on the holding of *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 282-283 (6th Cir. 1987) *en banc*. The gross negligence standard of *Nishiyama* was recently overruled by the Sixth Circuit which now adheres to the "deliberate indifference standard. *Foy v. City of Berea*, 58 F.3d 227, 230 (6th Cir. 1995).

respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986).

Governmental liability may be imposed for a single decision by a final policymaker under appropriate circumstances, but the government cannot be held liable for such decisions by someone who is not a final policymaker. *Id.* It is the law of the state which determines who is a policymaker for purposes of a Title 42 U.S.C. § 1983 complaint. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Proof of a single incident of deprivation pursuant to an unconstitutional policy may be sufficient, "[b]ut *where* the *policy* relied upon *is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both* the requisite *fault* on the part of the municipality, *and* the *causal connection* between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824. (emphasis supplied). To show a deprivation by custom or policy in the area of police training, a claimant must show that, "the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come in contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)

In the case under review here, the Eleventh Circuit Court of Appeals declined to resort to the factual analysis of policy, custom or training that it had done in the *Cannon* case. The Eleventh Circuit found such consideration unnecessary[14] under the standards of *City of Los*

---

[14] In his concurring opinion Judge Anderson not only agreed with Judge Hatchett that Deputy Watson had not

Angeles v. Heller, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986); *Vineyard v. County of Murray, Ga.*, 990 F.2d 1207 (11th Cir. 1993); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-298 (8th Cir. 1989).

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that the Petition for Writ of Certiorari should be denied and the decision of the Eleventh Circuit Court of Appeal should stand.

Respectfully submitted,

TURA SCHNEBLY
FL Bar No. 231290
Assistant County Attorney
123 W. Indiana Avenue
DeLand, FL 32720
904-736-5950
Attorney for County of Volusia and George Lee Watson, in his official capacity

DATED: October 6, 1997

---

violated the Rooneys' due process rights but also opined that the evidence proffered by the Rooneys led him to readily conclude that the Rooneys failed to show that the County of Volusia was deliberately indifferent in any manner that could cause the accident. *See* Petition for a Writ of Certiorari, App.10.

TABLE OF CONTENTS

Page

Answer Brief of Defendants/Appellees County of Volusia and George Lee Watson, in his official capacity, pages 5-17 .....App. 1

* * *

RE: DEFACTO POLICY

Pursuant to Article VIII, Section 1(c), Fla. Const. (1968), the citizens of Volusia County adopted a Home Rule Charter which was created by Special Act of the Florida Legislature. (R-61, Exhibit 1); *See also*, Ch. 70-966, Laws of Florida, as amended. As established by the Home Rule Charter, it is Volusia County that is the body corporate and politic and is empowered as the government. (Sp.Acts 70-966, Art. I, §102 and Art. II, §201). In litigation involving policy or simple negligence of its employees, the corporate body is to be named as the party. (Sp.Acts 70-966, Art. XIII, §1306) by its corporate name of the County of Volusia. (Sp.Acts 70-966, Art. I, §103). It is the County Council which is imbued with the power of setting policy for the County of Volusia. (Sp.Acts 70-966, Art. II, §203) The Sheriff is the elected Director of the Department of Public Safety for the County of Volusia, sometimes commonly called Volusia County Sheriff's Department or Volusia County Sheriff's Office. (Sp.Acts 70-966, Art. VI §602.1(1)). The Sheriff is the principal officer of the Department responsible for carrying out the responsibilities of law enforcement in Volusia County. (Sp.Acts 70-966, Art VI, §601.1(2) and §602).

The Policy and Procedures Manual in effect on January 23, 1989, for the Volusia County Department of Public Safety contained the following written policy addressing operation of a patrol vehicle for non-emergency matters:

> Section 130.12, *Safe Driving of Department Vehicles*: Operators of Department vehicles shall operate such vehicles in a reasonable and safe manner exercising due caution and judgment. They shall obey the motor vehicle laws and

> traffic regulations of the State. Drivers shall adhere to Procedures Directives on emergency and pursuit runs. (*See* Procedure Directive N-1-86, at R5-136, Ex. 1).

Procedure Directive N-1-86 addressed operation of a patrol vehicle as an authorized emergency vehicle. *Id.* This Procedure Directive allowed a deputy sheriff to proceed above the posted speed under certain conditions but only with emergency lights activated. *Id.* The use of the siren was desirable but not always required. *Id.* Policy N-1-86 adopted a more stringent standard than the referenced Florida Statutes 316.072 (1989) for operation of an authorized emergency vehicle. *Id.* If a deputy went in excess of the posted speed to a non-emergency matter, it violated this policy. (R5-169, p.107); (R5-173, p.44); (R5-156, p.33).

Deputy George Lee Watson testified that he knew and understood the department policy as stated in N-1-86 and knew no policy allowed him to go in excess of the posted speed to a non-emergency matter. (R5-136, Ex. 1). He had known the essence of this policy since rookie school. (R5-179, p.90). There was no deposition testimony of any law enforcement officer that they ever saw Deputy Watson driving his patrol car above the posted speed to a non-emergency matter. (R5-159, pp.17-18); (R5-162, p.41); (R5-160, p.33); (R5-167, p.48 (21-23)). No supervisor from any agency regarded George Watson's driving a problem. *Id.* and (R5-145); (R5-167, p.48 (24-25)); p.49 (1-3).

In deposition testimony, ranking officers in the Department of Public Safety acknowledged that there were complaints from time to time of deputies going

above the posted speed without lights and/or siren activated and that typically, the complaints were made through a telephone call. *See* (R5-145); (R5-169, pp.69, 77-83); (R5-149, p.75-87); (R5-173, pp.61-62); (R5-151, pp.61-63); (R5-160, p.34). The testimony of these officers was unanimous that such complaints were investigated to the extent possible based upon the information provided by the complainant. *Id.* Deputies who could be identified were interviewed and appropriate measures were taken by supervisors in the deputy's chain of command including the Sheriff or by Internal Affairs. *Id.* The action taken, if disciplinary, usually reflected progressive discipline relating to frequency and/or severity of infraction by the deputy involved. *Id.* The disciplinary actions were in compliance with Procedure Directives J-2-84 and J-3-84. (R5-191).

Internal Affairs was the formal investigating arm of the department for personnel infractions of policy and procedure. (R5-149 pp.75-87 and 91-103). Citizens complaints would be handled in accordance with Procedure Directive J-4-84. (R5-191). For "speeding" complaints, Internal Affairs usually documented the complaint on a log obtained preliminary information to provide to supervisors for follow-up; and either counselled the deputy or the supervisor did so. *Id.* Documentation of counselling and the logs were destroyed under Public Records destruction order and schedule. (R5-149 p.86). Captain Bosco, who worked in Internal Affairs for the relevant time period, remembered one time a repeat offender for speeding was brought to his attention after counselling but repeat offenders were uncommon. (R5-149 pp.79, 81). Documented oral reprimands could be purged from files

upon a deputy's request, if no similar infraction occurred in a year but written reprimands could not. *Id.* Most if not all written reprimands regarding "speeding" were associated with an accident. *Id.*

Testimony of Major Sidney Massey, Lt. Randall Burnsed, and Captain Robert Bosco also revealed that the County of Volusia had a Risk Management Department and an Accident Review Committee. (R5-169, p.72); (R5-149, pp.91-103); (R5-160, p.32). The Accident Review Committee consisted of representatives from the various County departments who made recommendations to department/division heads as necessary regarding discipline and/or training of the County employees involved in any accidents. *Id.*

All extant accident reports and other documents reflecting disciplinary and/or training action taken regarding accidents involving all department motor vehicles were analyzed for the period from January, 1985, through and including January 23, 1989. (R5-144); (R5-141). During that time period, the Department of Public Safety had approximately the following number of sworn personnel: (a) 223 from January, 1985, to October, 1, 1985; (b) 269 from October 1, 1985 to October 1, 1986; (c) 276 from October 1, 1986, to October 1, 1987; (d) 286 from October 1, 1987 to October 1, 1988; and (e) 306 from October 1, 1988 to January 23, 1989. (R5-146). Virtually all of these sworn officers were assigned a department vehicle on a twenty-four hour basis under the Indianapolis Plan. *Id.* The Department sedans were driven approximately 20,000,000 total miles annually for 1985 through January 23, 1989. *Id.* This mileage figure does not include

transport vans or other special service motor vehicles which were also assigned to personnel. *Id.*

The analysis of the accidents categorize accidents as those occurring on patrol, in response or in pursuit. (R5-190). The patrol designation is for non-emergency operation of the motor vehicle and reflects vehicular accidents *other than* those occurring during a response or a pursuit. *Id.* Department vehicles on the table designated "patrol" include all department motor vehicles and are not restricted to those accidents involving the patrol division (a/k/a law enforcement services). *Id.* The action taken ranged from counseling to written reprimands and included retraining at the Emergency Vehicle Operations Course or attendance at a one day Defensive Driving Course. *Id.*

To support the defacto policy argument, Plaintiffs offer the deposition testimony of friends, family and work associates, who stated that they have observed deputies going above the posted speed without their patrol cars' lights or sirens activated prior to January 23, 1989. (R5-164, p.18 (1-5); R5-171, p.8-9; R5-175, p.13 (3-12); R5-174, p.15 (18-23) (24-25); p.16 (1-5); R5-154, p.11 (8-20); R5-168, p.8 (10-13); p.9 (1-5); R5-170, p.30 (9-11) and (20-24); p.31 (2-6) and (7-10)).

Their deposition testimony also showed the following "facts." Their testimony concerning deputies' driving over the posted speed may be categorized as follows: (a) Not over 60-65 mph/speed limit 55 mph (R5-166, p.10 (24-25); R5-168, p.13 (12-16); p.18 (2-4)); (b) 65-70 mph/speed limit 55 mph (R5-175, p.17 (21-25); p.19 (14-16)); (c) over 70 mph/speed limit 55 mph (R5-174, p.20 (13-15));

(d) 60 mph/speed limit 45 mph (R5-154, p.17 (18-24); p.19 (16-18); R5-170, p.35 (11-20)). These witnesses were guessing or giving their best estimates of the speed observed. *Id*. Only one of these witnesses was driving a car with a calibrated speedometer (R5-175, p.27). Most testimony related to deputies driving on state or federal highways (S.R. 11, (R5-164, p.22 (2) and (19-21); S.R. 15A, (R5-154, p.12 (1-7); S.R. 17, (R5-170, p.31 (7-10); R5-174, p.37 (16-18); R5-175, p.17 (21-25); S.R. 40, S.R. 44, U.S. 92 R5-154, p.12 (2-7); R5-164, p.23 (1-3); R5-166, p.9 (18-19); p.10 (7-8); R5-168, p.9 (16-18; 22-23); R5-170, p.31 (7-10); R5-174, p.17 (20-24); R5-174, p.18 (21-25); and I-95 (R5-154, p.12 (1-7)). None of these witnesses observed any careless, reckless, or other notable behavior associated with a deputy's "going above the posted speed," (R5-154, p.24 (22-25); R5-164, p.24 (14-18); R5-166, p.11 (3-6) and (13); R5-168, p.14 (1-7); R5-170, p.36 (11-14); R5-175, p.8 (8-11)); nor did these witnesses see or come upon any of these deputies involved in a vehicular accident. (R5-164, p.18 (19-24); R5-168, p.14 (13-15); R5-170, p.36 (8-10); R5-171, p.10 (24-25); p.11 (1-6); R5-174, p.35 (18-20); R5-175, p.18 (1-7)).

None of the witnesses could identify specifically Deputy Watson or any other deputy as having been one of the deputies observed (R5-154, p.11 (8-20); p.21 (9-11); R5-164, p.17 (20-25); p.20 (18-19); and p.24 (19-24); R5-166, p.12 (1-11); p.15; R5-168, p.14 (25); p.15 (1); R5-170, p.28 (12-20); R5-171, p.9 (19-21); p.11 (7-8); p.16 (4-6); R5-174, p.22 (10-12); R5-175, p.14 (5-9); and none could identify any of those observed as being black. (R5-154, p.15 (5-7); R5-170, p.42 (4-13); R5-171, p.9 (2-3); R5-174, p.20 (16-18); p.35 (10-12)). None of these witnesses knew the purpose

of the deputy's travel and drew their conclusions based upon the lack of activation of the patrol car's lights and siren. (R5-154, p.15 (22-25); R5-168, p.8 (17-24); p.14 (10-12); R5-175, p.18 (15-18)). None of these persons testified that they notified the County of Volusia of such observations before the accident in question. (R5-154, p.15 (15-17); R5-164, p.17 (4-11); R5-168, p.8 (15-16); R5-170, p.30 (5-8); p.34 (4-10); R5-171, p.10 (12-17); p.17 (2-3); R5-174, p.15 (13-17); p.20 (25); p.21 (1-9); R5-175, p.14 (17-19)).

Plaintiffs also rely on the testimony of their expert, Kenneth Harms, that sheriffs deputies had *no clear* written policies regarding operation of patrol vehicles and discipline for violations. (emphasis added) (R-153, pp.81, 89-91; 100; 102; 113-117).

Mr. Harms had not reviewed the entire Policy and Procedures Manual of the Volusia County Department of Public Safety prior to his testimony and his document review included accidents *after* January 23, 1989. (R5-153, p.153). To have a clear written policy, he testified required a schedule of sanctions but he could name no jurisdiction which had such a policy. *Id.* at pp.93-98. Based on a review of departmental records and depositions, which he acknowledged was not all the documentation available, Mr. Harms opined there was a *defacto* policy allowing deputies to speed to non-emergency matters condoned by supervisors at the highest levels of the Department of Public Safety inclusive of the Sheriff and that the pervasive condoned conduct resulted in dozens and dozens of accidents known to the Sheriff and other county officials who took no action which Mr. Harms

viewed as discipline. *Id.* at p.28; p.163. Mr. Harms admitted he had found both oral and written reprimands in those he did review (*Id.* at p.114) but Mr. Harms asserted that the type and number of sanctions that were imposed created a lawless atmosphere and encouraged deputies to drive however they wanted. He denied he had been so encouraged when he was given a verbal reprimand. *Id.* at 98. He admitted that his analysis did not categorize by officer, accident type, or ratio of accidents to miles driven. *Id.* at 115.

Mr. Harms reviewed no records of George Lee Watson reflecting that George Lee Watson exceeded the speed limit. (R5-153, p.72, p.145). Mr. Harms indicated that all the depositions he reviewed no deponent reported observing George Lee Watson operating a patrol car above the posted speed. (R5-153, p.149).

RE: TRAINING

In the middle 1970's former Sheriff Edwin Duff, II, supported the creation of a training facility to teach Volusia County deputy sheriffs an Emergency Vehicle Operation Course (EVOC) above that taught in basic law enforcement ("rookie") school. (R5-147); (R5-169, p.91), (R6-192, pp.10, (16-34)). Sheriff Duff obtained the approval of the County Council of Volusia County and the Department received an LEAA grant. *Id.* A driving track was constructed on County property with the grant. (R5-147).

The driving course was taught during a 40 hour period and included classroom instruction and vehicular operation by students under low and moderate speed/

high stress conditions on the track. (R5-142); (R5-165, p.30); (R5-155, p.70-71) EVOC was taught through the Daytona Beach Community College as the certifying agency for the curriculum, using qualified instructors from the college and the Volusia County Department of Public Safety. (R5-142); (R5-165, p.76); (R5-145, pp.97, 98, 102); (R5-155, pp.70-71); (R5-160, pp.25-27); (R5-172, pp.19-24). The training included Florida law regarding use of the patrol car for emergency and non-emergency matters. (R5-155, p.43 (19)); (R5-172, pp.23-25). By inference deputies were not taught that they could exceed the speed limit for non-emergency matters with or without the patrol car's emergency lights activated although there might be appropriate occasions to do so without the siren. (R5-155, p.44 (20-21); p.43 (19)).

From the inception of EVOC in 1979 through the date of the subject accident, the County of Volusia sent all sheriff's deputies to this course regardless of hire date. (R5-136, Exhibit 2); (R5-142). All deputies hired after the creation of the course were required to attend the course and satisfactorily complete the same as a condition of employment. *Id*. Following his employment by the County of Volusia, Deputy Watson satisfactorily completed the state certified course in October of 1982. (R5-142); (R5-179); (R5-180). Deputy Watson was a certified law enforcement officer when he was hired by the County of Volusia. (R6-193, p.29 (23-28); p.30 (1-3)). Deputy Watson attended EVOC two times because it was required of new hires at both the City of Port Orange

Police Department and the County of Volusia, Department of Public Safety. Neither EVOC training was disciplinary retraining because of an accident. (R5-179, p.48 (1-3) (4-9)).

Plaintiffs offer the opinions of two experts, Dr. Joseph A. Wattleworth for accident reconstruction (R5-150) and Kenneth Harms for police liability (R5-153). Dr. Wattleworth testified that the speed of the Watson vehicle caused the accident to occur; had Deputy Watson been going the speed limit, the accident would not have occurred as Watson's perception/reaction (stopping time) would have increased sufficiently for the Rooney truck to clear the intersection. (R5-153, p.82; pp.109-110).

Kenneth Harms found that except for speed, Deputy Watson was engaged in no other dangerous driving practices on the night in question (R5-153, p.47); and Mr. Harms agreed that the speed in this case is more akin to a high speed response than a police pursuit at high speeds. *Id.* at 120. The speed was assumed based on Dr. Wattleworth's opinion. *Id.* at 27. Mr. Harms opined that a deputy sheriff should be trained on a "high speed" track if that deputy sheriff will operate a patrol vehicle at high speed. *Id.* at 131-134. When he was Miami's Police Chief, Mr. Harms acknowledges that his officers were not trained on a high speed track, *id.* at 138, and admits that officers of the Florida Highway Patrol (of which his brother was one) are not and have not been trained on a high speed track. *Id.* at 140.

The County had its officers trained in a course certified by the State of Florida including vehicular operation over a driving course essentially the same as all other

driving courses for training law enforcement officers in Florida and the United States. (R5-143). The training required by Volusia County exceeded the state basic requirements for law enforcement officers in the operation of a motor vehicle. *Id.*